Legal Aspects of Digital Marketing Communication in the Scope of International Business – Unsolicited Advertising Case Comparison

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Abstract

Purpose of the article Intensive use of Internet technologies influences many aspects of the business behavior of companies globally. There are many unclear and unanswered questions related to the fact that regulations and laws are valid based on geographical borders but, at the same time, the Internet is fully global and independent of geographical borders. This article is focused on a comparison of the legal rules related to unsolicited advertising used within Internet technologies (so-called SPAM) in the Czech Republic, EU as a general, and the United States.

Methodology/methods Critical review of the scientific publications and respective laws and regulations was used as a primary method within this paper. Based on those critical reviews the structured comparison of the rules valid in the Czech Republic, EU and USA was performed. Finally, the business practice implications were formulated and particular recommendations to companies were prepared.

Scientific aim Scientific aim of the article is in observing and describing the actual situation and trends in the international business environment within the use of Internet-based technologies in companies' marketing communication with the respective legal rules. Important is also the multidisciplinarity of the article covering both marketing and legal business issues.

Findings The article shows a comparison of all the important parameters of the legal regulations of electronic business communication using Internet technologies in between the Czech Republic, EU, and the USA. The primary focus is on the Opt-In and Opt-out rules related and their implications to the day-to-day business. Major advantages and disadvantages are then formulated for each observed region.

Conclusions Based on critical literature and legal document review and in-depth comparison of the situation in the Czech Republic, EU, and the USA important recommendations were formulated for the companies for their day-to-day business activities and related communication using Internet technologies. Those recommendations also fully reflect actual best practices within an international business environment.

Keywords: marketing communication, customer, relationship marketing, legal liability, international business, market orientation, Internet technology-based communication, unsolicited advertising

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Introduction

Not only current legislation related to the issue of intrusive communication in marketing, but also its theoretical background and historical development are important for a correct understanding.

Unsolicited advertising enshrined in current Czech legislation can be considered a broader, more general term for unsolicited advertising. In the case of its online form of mass-distributed unsolicited commercial advertising, it is often referred to as SPAM. This designation is most likely based on the American canned lunchmeat brand. When creating this brand, the author came up with the combination of the words SPiced hAM. But you can also find other versions of the origin, often for example an abbreviation from the English Shit Posing As Mail, which is a decent translation that means Waste that appears as postal writing.

The SPAM is defined as the attempt to abuse of, or manipulate, a techno-social system by producing and injecting unsolicited, and/or undesired content aimed at steering the behavior of humans or the system itself, at the direct or indirect, immediate or long-term advantage of the spammer(s) (Ferrara, 2019).

Ferrara also describes when it started: "The first mention of SPAM comes from the 19th century. During this period, the telegraph company Western Union allowed messaging to multiple destinations. In 1864, the first unwanted telegram sent to the receiver was recorded. As a result, until the Great Depression, wealthy North Americans were overwhelmed by unclear investment offers."

The issue of unsolicited advertising primarily falls under private commercial law, its part focused on un-fair competition. At the same time, it is usually mentioned in public law regulations aimed at regulating advertising, information society services, or the protection of personal data (Cranor & LaMacchia, 1998).

The theoretical background and the historical development of the law against unfair competition are briefly summarized in Chapter 14 of Hajn in Bejček et al. (2014). The initial understanding of the law against unfair competition was focused on specific rules of business ethics. Above all, a functional concept of competition aimed at protecting performance competition was developed. In recent years, the concept of the law against unfair competition has emerged as a tool to protect investments.

The historical origin of the legislation on the unfair competition can be traced to Articles 1382 and 1383 of the French Code Civile, which generally governed civil liability for damage. The Paris Union Convention for the Protection of Industrial Property of 1883 subsequently played an important role in the development of anti-unfair competition law (Bejček et al., 2014, p. 208). It is therefore clear that the effort to ensure the basic rules in business competition has a long tradition and from the beginning was driven by the intention to create a basic framework in an international context with the knowledge that national borders do not play an insurmountable barrier. On the contrary, in today's globally interconnected business world, state borders are largely disappearing. Most expert opinions on the resolution of conflict issues in international disputes prefer the border determinant of the place where the obvious damage occurred, rather than the place where the act establishing the state of unfair competition took place (Rozehnalová, 2010).

As for unsolicited advertising, this has historically included mainly aggressive business practices of relentless traders, printed advertising placed in mailboxes, or telephone harassment. With the development of electronic forms of communication via the Internet, unsolicited advertising in the form of SPAM has grown to enormous proportions (Ferrara, 2019). This is mainly due to the very low costs for the electronic dissemination of commercial communications. This change in the behavior of companies has made it necessary to amend the relevant legislation. Adjustments were gradually made in all monitored countries.

As there are no borders in the digital environment and the trade is global, it is important to understand the rules valid in different world regions and adapt business behavior accordingly. Thus, this article is based on a critical review of the history and actual legal frameworks in the Czech Republic, the European Union, and the United States. Those critical reviews are then compared and respective managerial implications and their discussion is provided in the last section of the article.

1 History and actual legal framework in the Czech Republic

After the founding of Czechoslovakia in 1918, the newly formed republic undertook on October 5, 1919, to ratify the Paris Convention for the Protection of Industrial Property. The law against unfair competition in Czechoslovakia was thus based on the European rules in force at the time. No wonder - Czechoslovakia was at

that time one of the most advanced industrial economies in Europe, it was a very open trade economy intensively involved in international trade. Compliance with Czechoslovak law against unfair competition with legislation in force in other European countries was more or less a necessity. Comprehensive regulation of the right of protection against unfair competition was brought into the legal framework of the Czechoslovak Republic by Act No. 111/1927 Coll., on protection against unfair competition. This legal regulation was valid in Czechoslovakia until 1950. It was a good quality regulation, which subsequently served as inspiration in the creation of a new law in 1991.

Looking at the history of the legislation on unfair competition in former Czechoslovakia after World War II, interruption in the law against the unfair competition can be found after the Communist Party took over the political power. In line with the political belief at that time, it was not necessary to define competition rules in the socialist establishment, because the economy and everything that arose within it was planned at a central national level and there was, therefore, no room for unfair competition.

As part of the two-year plan, the Civil Code No. 141/1950 Coll. was issued on 1st January 1951. Among other ideological provisions, this Civil Code repealed all legal regulations that had previously regulated the area of competition. This political measure then interrupted the development of the law against unfair competition in Czechoslovakia for 40 years. Later on an Act No. 109/1964 Coll., the Economic Code was issued and defined economic competition in the socialist spirit and generally all the relations between economic organizations in Czechoslovakia. The provisions of § 119 et seq. of the Economic Code regulated the principles of cooperation of socialist organizations, whose main goal was to protect the so-called needs of the national economy.

The change in legal regulations occurred shortly after the political changes that began with the Velvet Revolution in November 1989. In May 1990, Act No. 103/1990 Coll., Which amended the Socialist Economic Code, entered into force. It was a rapid adjustment that corrected the fundamental inconsistency in the understanding of competition in the socialist and ordinary market and competition concepts, respectively. A more comprehensive regulation was the Commercial Code of 1992 - Act No. 513/1991 Coll. The structure of the Commercial Code is based on a combination of provisions regulating as generally as possible the conditions under which unfair competition occurs, ie the general clause (referred to in § 44, article 1) supplemented by several specific most common facts of unfair competition, which are listed in the provision of § 44 article 2) of the Commercial Code and then contained in more details in the provision of § 45 to § 52 of the same Act. This concept is based on the First Republic Act on Protection against Unfair Competition, as well as on foreign legislation. The legal regulation of the Commercial Code was valid until the adoption of the new Civil Code valid from 1st January 2014.

The current regulation of the law against unfair competition in the Czech Republic is primarily enshrined in the new Civil Code (NOZ). Specifically, it is § 2972 et seq. In addition to the provisions in the NOZ, some aspects of competitive negotiations are also contained in Act No. 40/1995 Coll., On the regulation of advertising, and Act No. 480/2004 Coll., On certain information society services, and partly also Act No. 634/1992 Coll., on consumer protection.

In the case of contemplated international trade, the territorial and personal scope of the rules is important. The territorial scope is regulated in § 2973 of the Civil Code: The provisions of this title do not apply to proceedings to the extent that they have effects abroad unless the international treaties by which the Czech Republic is bound and which have been promulgated in the Collection of International Treaties provide otherwise. In other words, the traditional concept of assessing infringements of the rules of unfair competition in the place where the activities of unfair competition take place applies here.

Personal competence is then regulated in § 2974 of the Civil Code: Czech persons are placed on an equal footing with foreign persons who participate in a competition in the Czech Republic when it comes to protection against unfair competition. Otherwise, foreign persons may claim protection under international treaties by which the Czech Republic is bound and which have been published in the Collection of International Treaties, and if not, based on reciprocity.

The unsolicited advertising itself in the current regulation of the Civil Code is based on the earlier concept of so-called unsolicited advertising, which was assessed according to the general clause. Unsolicited advertising can be understood as unsolicited advertising in a more comprehensive and general sense.

Unsolicited advertising - the provisions of § 2986 of the new Civil Code stipulate:

- Unsolicited advertising consists in disclosing information about a competitor, goods, or services, as well as in offering goods or services using telephone, fax, electronic mail, or similar means where the recipient wishes to be subject to no such activity, or in the communication of advertising in which its originator conceals or disguises information which allows for his identification, and does not specify where the recipient can have the advertising ended without incurring extraordinary costs.
- Where advertising is sent to an electronic address which an entrepreneur acquired in connection with the sale of goods or provision of services, this does not constitute unsolicited advertising if the entrepreneur uses the address for the direct advertising of his goods or services, and the other party has not prohibited such advertising despite having been informed by the entrepreneur in the acquisition of the address and each time it was used to advertise of the right to have the advertising ended without any additional costs.

To fulfill the factual nature of unsolicited advertising according to the above paragraphs, it is necessary that the provisions of the general clause have to be fulfilled at the same time, namely all three of its conditions at the same time:

- the participation of a competitor in economic relations
- contradiction with good morals
- the ability to cause harm to other competitors or customers.

It is therefore a simultaneous fulfillment of the conditions of the general clause together with the provisions of the above-mentioned Section 2986.

In addition to the above-mentioned regulation in the Civil Code, the provisions of Act No. 480/2004 Coll., On certain information society services, the provisions of Act No. 634/1992 Coll., On consumer protection and partly also the provisions of Act No. 40/1995 apply to the issue.

2 History and actual legal framework in the EU

As mentioned earlier, in the European area, the law against unfair competition is based primarily on the Paris Union Convention for the Protection of Industrial Property of 1883. It was an international agreement which in Article 10 bis obliges the Member States to ensure effective protection against unfair competition.

The current legislation is based on both the primary law of the European Union and the EU directives listed below.

Within the framework of EU primary law, the Treaty establishing the European Community is important, which included a ban on quantitative restrictions on imports and exports between the Member States, as well as a ban on all measures having equivalent effect. It is therefore one of the pillars of the functioning of the European Union - the free movement of goods and services between the Member States.

More precise specifications of individual unfair competition practices are then part of the following EU directives:

- Directive 2006/114 / EC of the European Parliament and the Council concerning misleading and comparative advertising. This Directive regulates the relationship of competition between traders. It does not apply to consumer relations.
- Directive 2005/29 / EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450 / EEC, Directives 97/7 / EC, 98/27 / EC and 2002/65 / EC and Regulation (EC) No 2006/2004 of the European Parliament and the Council (Unfair Commercial Practices Directive). For a change, this directive focuses on unfair consumer practices.
- Directive 2002/58 / EC of the European Parliament and of the Council of 12 July 2002 concerning the pro-cessing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
- Directive 2000/31 / EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Czech law against unfair competition is harmonized with the EU and is not characterized by significant differences.

3 History and actual legal framework in the USA

1. Under U.S. law, unfair competition law is primarily aimed at offenses that cause economic harm to a company's prosperity through fraudulent or unauthorized business practices. Un-fair competition can be divided into two broad categories. It is a notion of "unfair competition" which focuses on torts confusing consumers through product offerings. The second category, "unfair commercial practices", covers all other forms of unfair competition.
2. Unfair competition does not apply to competition law aimed at antitrust law.
3. It is important to realize that within the United States, the law of unfair competition is primarily enshrined in the laws of the individual states of the American Union. At the federal level, only some partial parts are addressed, focused on, for example, registered trade-marks, copyright, or misleading advertising.
4. Concerning the unsolicited advertising itself, the legislation is primarily at the level of the individual states of the American Union. For electronic communication, the federal CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003) was subsequently adopted in 2003, which regulates the possibilities of sending commercial offers via electronic media. This law specifically defines electronic commercial communication as any electronic mail whose primary purpose is the commercial advertising or promotion of a commercial product or service (including content on websites operated for commercial purposes). At the same time, the law defines quite clearly how these commercial electronic communications must be structured in terms of content and the possibility of rejection, and what electronic technologies can be used to disseminate them. Subject to defined rules, commercial electronic communications can be sent to anyone until the recipient actively refuses.
5. In the American business environment, there are many guidelines on how to create and distribute commercial electronic communications so that the company does not violate the CAN-SPAM Act of 2003. A good guide is, for example, the Federal Trade Commission website.

4 Comparison of the legal frameworks

It follows from the description of the individual legal regulations mentioned above that the Czech legislation is harmonized with the European legislation and differs only in small details. The comparison, therefore, shows the differences between the European and American conceptions of the legislation on unsolicited advertising - especially with a focus on electronic business communication. The most important parameters for comparing the rules of sending electronic business communication are the following:

Rules to whom and under what circumstances it is possible to send electronic business messages (so-called Opt-In and Opt-Out requirements), requirements for marking the header of the sent electronic business message, and also requirements for identification of the sender, including his physical address. The comparison of individual parameters is shown in the following table No. 1, partly based on the over-view of Opt-In Laws in North America and Europe.

Table 1 Comparison of basic parameters of legal regulations for sending electronic business messages

	Czechia	Europe	United States
Opt-In rules	(1) 'Unsolicited advertising is the communication of information about a competitor, goods or services, as well as the offer of goods or services by telephone, fax machine, electronic mail, or similar means, even though the recipient does not wish to do so, or the communication of advertising in which its the originator shall conceal or obscure the information from which it can be ascertained and shall not indicate where the recipient may order the termination of the advertisement at no extra cost. (2) If the advertisement is sent to an electronic address obtained by the entrepreneur in connection with the sale of goods or provision of services, there is	Commercial communications may only be sent to recipients who have given their prior consent (opt-in). This is especially required for B2C consumer-focused communication. For business-to-business communication (B2B), ie legal entities, the rules are not set by European directives. It is up to the member states whether even in this case they require prior consent by national legislation. At the same time, the following applies to the current business relationship: The business relationship in which the contact information was obtained constitutes prior consent, provided that the addressee has the option of simply	Legal regulations do not regulate. Business messages can be sent to anyone without restriction until they actively refuse to receive them.

	no unsolicited advertising if the entrepreneur uses this address for direct advertising for his goods or services and the other party has not banned the entrepreneur has pointed out the right to order the termination of the advertisement without special costs when obtaining the address and each time it is used for advertising. " No distinction is made between B2B and B2C.	revoking the consent and if the offers relate to the products on which the previous business relationship was focused.	
Opt-Out rules	Each message must contain instructions for simply rejecting future messages from the sender. The message must contain an email address for sending a reply with a refusal to send a future message.	Each message must contain instructions for simply rejecting future messages from the sender. The message must contain an email address for sending a reply with a refusal to send a future message.	Each message must include instructions for simply rejecting future messages from the sender (either by replying to the message or by visiting a simple website). The sender must secure the refusal within 10 days at the latest.
Rules for message identification	According to Act No. 480/2004 Coll. Sending an email for disseminating a commercial message is prohibited if (a) it is not clearly and unambiguously marked as commercial communication.	It is forbidden to hide or conceal the sender's identification in the message header.	CAN-SPAM prohibits false information in e-mail headers. The subject cannot deceive the recipient about the content or subject of the message. It must be clear from the header of the communication that it is a commercial communication.
Rules for sender identification	According to Act No. 480/2004 Coll. Sending an email for disseminating a commercial message is prohibited if (b) conceals or conceals the identity of the consignor on whose behalf the communication is made; or (c) it is sent without a valid address to which the addressee could directly and effectively send information that he does not wish the business information to continue to be sent to him by the sender.	Electronic business communications are subject to the same identification rules as standard postal services. The identification should include in particular: - the full name of the company and an indication of its legal form - headquarters - registration number - the address of the registered office of the company - European tax identification number A valid feedback address must always be provided.	In addition to the clear identification of the sender, the commercial communication must also contain a valid physical postal address at which the sender has its registered office or establishment.
Major advantages	Not strictly defined structure of electronic business messages/e-news allows a higher degree of marketing creativity.	Not strictly defined structure of electronic business messages/e-news allows a higher degree of marketing creativity.	It does not regulate the rules for Opt-In, so companies do not have to worry about sending business messages to customers with whom they have not yet had a business relationship.
Major disadvantages	Opt-In rules restrict the ability to send electronic business communications only to customers with whom the company already has a business relationship.	Opt-In rules restrict the ability to send electronic business communications only to customers with whom the company already has a business relationship.	Precisely defined structure of electronic business communication, which limits the creativity of marketing practice.

Source: own

The table clearly shows where the differences in legislation are in the individual regions. The following chapter will show the possibilities of using electronic commercial communications in international trade so that they are not considered as a violation of the rules against unfair competition.

5 Managerial Implications

The previous chapter introduced the basic legal rules against unfair competition and specifically the rules concerning unsolicited advertising, especially with the emphasis on the currently most significant form of electronic commercial communications. When comparing legal regulations in the Czech Republic, more generally in the European Union and also in the United States, some differences were identified that occur in individual legal regulations. The legal practice also implies the rule of assessing a possible violation of the rules against unfair competition according to the place where the violation of the rules of competition occurred. In the case of electronic distribution of commercial messages, determining the location is relatively problematic. The electronic distribution of business messages takes place via the Internet, which knows no geographical boundaries. In international business, messages are often written in English in a global business environment and intended for all customers around the world. In addition, many companies use email addresses whose Internet domain does not reveal in which country the company is based or in which country the specific addressee working for the company operates. For example, many European companies typically use the American commercial domain .com, while companies

based in Germany may use the .de domain, but they also use it for the email addresses of their branches outside Germany, for example in the USA.

It is then very problematic, if not impossible, for creators and senders of electronic commercial communications, if not impossible, to identify in which country the addressee concerned operates and therefore which specific legislation should be followed so that legislation.

6 Discussion, conclusion, and recommendations for companies

Considering the above, one of the following options can be recommended for companies operating in a global business environment and using an electronic distribution of business messages.

1. When a company wants to be sure that it does not violate anti-unfair competition rules in either the European Union or the United States (and most likely in other major trading regions), it should follow the stricter option in all the different provisions. Specifically, the Opt-In rules valid in Europe and a precisely defined identification and content structure according to the American CAN-SPAM Act. This variant of the company will provide a relatively high degree of certainty that its business communications will not be attacked by unfair competition practices. On the other hand, adhering to all these restrictions will significantly reduce the flexibility and marketing creativity that is important in commercial communications as a form of advertising.
2. When a company's goal is to reach its existing customers regularly and, if possible in a creative form not so much disseminated by American rules for the identification and structure of communications, it is advisable to follow European rules. These enable a higher level of marketing creativity. At the same time, in this case, the European rules for Opt-In do not matter, because the company targets its existing customers.
3. When a company needs to reach new customers with its message and provide them with at least basic information about its business offer, it can try to follow the American Opt-In rules without barriers. In this case, however, the company should have its registered office in the USA (or at least a significant branch that would send these messages to customers) and, of course, should comply with other rules applicable under US law. Most likely, they would defend themselves against accusations of unsolicited advertising from a potential customer in Europe, citing US rules and non-existent borders on the Internet.
4. Another possibility, which no longer makes sense in the pursuit of serious international trade, is the sending of electronic messages from hard-to-identify servers, for example in Asia and regardless of the above rules in force in Europe or the United States. While the company would in all likelihood de-fend itself against legal disputes for violating the rules against unfair competition, it would in all likelihood be completely missed by its communication in this way. It is difficult to imagine that some of the addressed customers would consider the electronic messages sent in this way to be serious and trustworthy.

This brings us to an important aspect of the rules against unfair competition, and thus self-regulation is driven by common sense and the company's efforts to operate in the market for a long time and good long-term relationships with customers and other business partners. It is difficult to imagine that a company that regularly and significantly violates the rules against unfair competition would be able to convince customers in the long run of its seriousness and honest approach to business and customer service.

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